the payment of reciprocal compensation for these calls, "as negotiations were drawing to a close, without alerting Hyperion, and notwithstanding the Commission's July 17, 1997 interim ruling, [Bell Atlantic]-NY unilaterally added new contrary language to a September 26, 1997 draft of the agreement." Id. at 17-18.[6] In order to receive the compensation, Hyperion had to give up the progress it had made with previously negotiated terms and opt into another carrier's agreement under 252(i). Id. at 18. While the adopted contract clearly required Bell Atlantic to pay reciprocal compensation for these calls, Bell Atlantic continued to refuse to pay. Id.[7] Hyperion was forced to file a complaint and finally, in a January 15, 1998 letter, Bell Atlantic-NY agreed to compensate Hyperion for calls terminated to ISPs. Id. at 18 n.33.

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6 The Commission approved Bell Atlantic's acquisition of NYNEX on August 14, 1997.

7 More recently, Bell Atlantic has attempted to require a CLEC electing an agreement pursuant to Section 252(i) "to adopt prospectively any subsequent modifications to the agreement that the original parties subsequently negotiate." Hyperion Comments at 19.

Post-merger Examples of the Spread of Degraded Practices in the Acquired BOC's Territory and Worsening Conditions in the Acquiring BOC's Territory

April 1, 1999

The anticompetitive effects of a merger between BOCs can be demonstrated by comparing pre-merger and post-merger practices. For example, one can compare the *acquired* BOC's business practices pre-merger to its practices post-merger. To the extent that the acquiring BOC imposes its business, regulatory, and legal positions on the acquired BOC, a spread of degraded practices may result. In addition, one can examine the *acquiring* BOC's business practices pre- and post-merger. Given that the acquiring BOC has an increased incentive to protect its larger monopoly footprint, one would expect to see its business, regulatory, and legal positions worsen post-merger. The following anecdotes demonstrate that both of these effects occurred after the SBC/Pacific Telesis and Bell Atlantic/NYNEX mergers.

- Prior to its merger with SBC, Pacific Bell ("PacBell") "used a billing format that was designed for carrier-to-carrier transactions for billing on services that MCI obtained from Pacific Bell. Following the merger and at the behest of SBC, Pacific Bell unilaterally substituted another billing format that SBC uses for *retail* sales -- a format significantly less useful to another carrier." Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Licenses and Section 214 Authorizations, CC Dkt. 98-141, MCI Comments at 23 (FCC Oct. 15, 1998). PacBell previously employed CABS, which "provides extensive information that a carrier can use both for its own billing and to verify the accuracy of the ILEC's bills." Id., Beach-Fauerbach Aff. ¶ 11. Under CABS, MCI would receive two bills, due on the same date. Id. SBC switched PacBell to CRIS, which not only provides "substantially less information than does CABS," but also makes it harder to verify and reformat the bills and generates 38 bills due on 19 different dates. Id. ¶ 12.

- AirTouch attempted to implement a "Calling Party Pays" ("CPP") plan, which would require AirTouch to negotiate a billing and collection agreement with the ILEC. Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Licenses and Section 214 Authorizations, CC Dkt. 98-141, KMC Comments at 18 (FCC Oct. 15, 1998) ("KMC Comments"). AirTouch had set up a market trial with PacBell; after its sale to SBC, PacBell informed AirTouch that it was not interested in pursuing the trial. Id. at 19. SBC later told AirTouch that it could not use PacBell's tariffed billing and collection services to provide CPP. Id. AirTouch has filed a complaint to force

3. Ameritech has failed to comply with those provisions of the ICC's TELRIC order regarding common transport. Id.

4. Ameritech is currently in non-compliance with the state's Infrastructure Maintenance Fee ("IMF") Act. Id. at 124-25. Although Ameritech filed a request for further variance from the IMF, that request was filed six weeks after expiration of the prior granted variance. Id. at 125.

> This delay in implementation has resulted in all Ameritech customers being overcharged for a period that will exceed one year. Although Ameritech Illinois will be required to refund these overcharges with interest, this example serves to illustrate Ameritech Illinois' failure to act in a timely manner. All other Illinois telecommunications carriers have complied with this change in statute in a timely manner, and did not find it necessary to request even one waiver of the [ICC's] Order.
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> Id.

5. The ICC has identified eight specific instances where information supporting Ameritech's cost studies filed in support of its tariff "was either inaccurate, incomplete or in violation of the [ICC's] rules, regulations, or Orders." Id.

The ICC staff stated that it expects this pattern of non-compliance to grow even worse if the merger is allowed to be consummated. Id. at 126.

- Bell Atlantic conceded in the Local Competition docket that inter-carrier compensation, as opposed to access charges, applied to ISP-bound traffic:

> [T]he notion that bill and keep is necessary to prevent LECs from demanding too high a rate reflects a fundamental misunderstanding of the market. If these rates are set too high, the result will be that new entrants, who are in a much better position to selectively market their services, will sign up customers whose calls are predominantly inbound, such as credit card authorization centers and Internet access providers. The LEC would find itself writing large monthly checks to the new entrant.

Bell Atlantic Reply at 21. However, Bell Atlantic -- *after* its concession in the Local Competition docket but *prior to* the FCC's recent declaratory ruling -- has nonetheless refused to execute any agreement with Sprint that does not state that Internet traffic is not local and not subject to reciprocal compensation. Sprint was forced to file pleadings in Delaware, Maryland, Virginia, and West Virginia regarding its right to adopt these agreements in the form in which they were originally executed.

Hyperion has also experienced problems regarding Bell Atlantic's refusal to remove language excluding local traffic to ISPs from reciprocal compensation. Hyperion Comments at 17. While Bell Atlantic-NY's initial drafts did not discriminate against

PacBell to honor its tariff. Id. (On a related note, AirTouch currently has billing and collection agreements with Ameritech that allow provision of CPP.)

- In New York and other NYNEX states, NYNEX had allowed assignment of existing customer contracts to resellers without treating the assignments as contract terminations and without triggering termination penalties. Bell Atlantic has reversed that position since the merger, refusing to honor assignment requests submitted by resellers. "Since large business customers typically have multiple contracts with varying termination dates, a prohibition on an assignment of such contracts to resellers seriously injures the resale market for such customers, since few are willing to incur the often hefty termination penalties." Joint Application for Approval of the Reorganization of Illinois Bell Telephone Co. d/b/a Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc., Dkt. 98-0555, Direct Test. of Charlotte F. Terkeurst on Behalf of the Government and Consumer Intervenors, GCI Ex. 2.0, at 50 (ICC Oct. 28, 1998).[1] (On a related note, Ameritech allows contract assignments without termination fees. SBC charges termination fees and other related liabilities. Id. at 51.)

- Complaints against Bell Atlantic-Vermont have increased 9% since the Bell Atlantic/NYNEX merger (from August 1996 to July 1998).

- In its Reply in the Local Competition docket, Bell Atlantic rejected the FCC's "pick-and-choose" interpretation of Section 252(i), but nonetheless recognized that the provision "gives all potential new entrants the right to the same agreement that any other local competitor reaches with the incumbent." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dkt. No. 96-98, Bell Atlantic Reply at 4 (FCC May 30, 1996) ("Bell Atlantic Reply"). Since its merger with NYNEX, however, Bell Atlantic has refused to allow carriers to elect another agreement, even when the carrier agreed to accept the same agreement in its entirety.

  For example, Focal reports that it attempted in March 1998 to exercise its 252(i) rights by electing Bell Atlantic's agreement with MFS in Delaware, New Jersey, and Pennsylvania. Applications of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Licenses and Section 214 Authorizations, CC Dkt. 98-184, Focal Comments at 12 (FCC Nov. 23, 1998). "Bell Atlantic responded by submitting to Focal versions of the MFS Agreements containing completely revised rate schedules and certain other minor changes." Id. Although the MFS contract "contained express language stating that certain rates were fixed for the term of the agreements, Bell Atlantic took the position that the rates . . . were superseded by subsequent state commission approval of its SGAT in

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[1] See also Complaint & Request of CTC Communications, Inc., Case No. 98-C-0426, Order Granting Petition (N.Y. Pub. Serv. Comm'n Sept. 14, 1998) (discussing Bell Atlantic-NY's post-merger change in position regarding termination penalties).

agreements." Id. For example -- even though the agreement had been signed by NYNEX after the Iowa Utilities Board decision and with full knowledge of it, Bell Atlantic notified Lightpath that Bell Atlantic would no longer honor those contractual provisions that it considered to be in violation of the 8th Circuit's decision. Id. at 2-3.

- PacBell had agreed that any change to its OSS interfaces would require joint management, maintenance and operation with AT&T. Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Licenses and Section 214 Authorizations, CC Dkt. 98-141, AT&T Petition at 20-21 (FCC Oct. 15, 1998); see also id., Aff. of A. Lee Blitch on behalf of AT&T. Prior to the merger, PacBell proposed a system change to the Resale Mechanized Interface. Id., Blitch Aff. ¶ 18. PacBell assured AT&T that this change would not require programming work or systems modifications. Id. PacBell asserted "A major issue that needs to be understood is that there are no changes to the existing NDM specifications from a CLEC perspective." Id.

  After the merger, PacBell "changed course and proposed a major system change that would have greatly impaired the ability of AT&T to use these interfaces." Id., AT&T Comments at 21. PacBell ignored the joint implementation requirements and refused to enter into a Joint Implementation Agreement with AT&T. Id., Blitch Aff. ¶ 19. AT&T had to re-arbitrate the issue, adding delay. Id. ¶ 20. In addition, the merged entity "took the peculiar position that JIA obligations were only triggered by testing of new or changed systems, not implementation of these systems." Id. Under this theory, PacBell could "unilaterally implement untested changes to the interface without notice or agreement" by CLECs. Id. After one day of hearings, the parties agreed to a Change Management Process to manage future changes to the OSS interfaces. "It is my belief that had SBC not taken over Pacific, the development of a JIA and a Change Management Process would have been significantly faster and more efficient, and would not have required AT&T to institute arbitration proceedings." Id. ¶ 21.

- The Illinois Commerce Commission ("ICC") staff has identified several examples of Ameritech Illinois' worsening behavior since the parties' merger announcement. For example:

  1. Ameritech failed to comply with an ICC order "reclassifying Bands B and C business rates and operator assistance/credit card charges as noncompetitive and [requiring Ameritech to] fil[e] new tariffs within 5 days of the order to refund the prior rate increases." Joint Application for Approval of the Reorganization of Illinois Bell Telephone Co. d/b/a Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc., Dkt. 98-0555, Staff Initial Brief at 123 (ICC Feb. 23, 1999).

  2. Ameritech has been lax in complying with ICC orders regarding reciprocal compensation, even after the Illinois federal district court's stay of the ICC's order expired. Id. at 124.

Delaware, and rate decision in New Jersey and Pennsylvania in which the respective state commissions established permanent rates." Id. at 13. Bell Atlantic refused to sign absent such changes. Id. Focal has since filed complaints in each state, including one in Delaware, in which Focal prevailed after a seven month delay. Id.

On August 7, 1998, when Hyperion informed Bell Atlantic of Hyperion's decision to elect an existing agreement in Vermont under 252(i), Bell Atlantic responded with preconditions, including requiring Hyperion to agree to: "(1) provide extensive service to residential customers in urban, suburban and rural areas and 'diverse locations' of Vermont, and (2) within 60 days of execution of the Agreement, to file amended tariffs to 'provide residence local exchange service' in Vermont." Applications of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Licenses and Section 214 Authorizations, CC Dkt. 98-184, Hyperion Comments at 19-20 (FCC Nov. 23, 1998) ("Hyperion Comments"). Neither condition is required by Vermont law. Id. at 20. Moreover, Hyperion's election request was delayed, forcing it to twice extend its existing contract with Bell Atlantic. Id.

On March 26, 1999, when Sprint informed Bell Atlantic of Sprint's decision to elect an existing agreement in the District of Columbia under Section 252(i), Bell Atlantic attempted to modify the contract's definition of "Dedicated Transport." Section 252(i) permits carriers to adopt interconnection contracts without such unilateral changes to the underlying agreement. Bell Atlantic dropped its request after Sprint refused Bell Atlantic's requested modification.

Bell Atlantic has also unilaterally modified its interconnection contracts with other carriers in Rhode Island and New Hampshire, which Sprint had elected to adopt under Section 252(i), to reflect Bell Atlantic's position that ISP traffic is ineligible for reciprocal compensation. Bell Atlantic also attempted to unilaterally change the terms of its approved SGAT in Vermont (again, such that ISP traffic is interstate and not subject to reciprocal compensation). On January 25, 1999, the New Hampshire Commission rejected Bell Atlantic's position and reaffirmed Sprint's right to elect an existing agreement "as is." On February 8, 1999, Bell Atlantic changed its tactics again and informed Sprint that Bell Atlantic would not make the New Hampshire and Rhode Island agreements available because they were more than one year old. As support for its one year time limit, Bell Atlantic cited the Supreme Court's observation in Iowa Utilities Board that such contracts shall remain available for a "reasonable" period of time after the agreement is available for public inspection under Section 252(f) of the Act. Bell Atlantic has taken a similar position with Focal. Neither the Act, nor any court or regulatory agency, has imposed a one-year time limit for adopting interconnection contracts pursuant to Section 252(i).

- In May 1996, SBC expressed its willingness to provide CLECs the unbundled loop including 2- and 4-wire analog and 2- and 4-wire digital configurations. See, e.g., Interconnection Agreement between SWBT and Brooks Fiber Communications of Tulsa, Inc., § VIII & App. UNE at 3-4 (Aug. 29, 1996) (expressly identifying

business customers in New York City, UNE-P would not be available for those central offices in which more than one CLEC was collocated. Petition of New York Tel. Co. for Approval of: Its SGAT and Conditions pursuant to Section 252 and Draft Filing of Petition for InterLATA Entry pursuant to Section 271, Docket No. 97-C-0271, Bell Atlantic-New York Prefiling Statement at 9 & n.10 (N.Y. Pub. Serv. Comm'n Apr. 6, 1998). Moreover, where "CLECs do not choose to assemble the platform for themselves, Bell Atlantic-NY may begin to assess an increasing additional recurring charge(s) that would, over the course of two years, raise the price of the unbundled platform to the CLEC to substantially the cost of similar resold lines." Id. at 9.

In New Jersey and Pennsylvania, Bell Atlantic offered an even more restrictive UNE-P in its prefiling statements: (1) for residential POTS and ISDN only; (2) availability limited to a 2 year period; and (3) where one collocator was present, UNE-P would not be available. Investigation Regarding Local Exchange Competition for Telecommunications Services, Docket No. TX98010010, Bell Atlantic-New Jersey Proposed Prefiling Statement at 2-4 (N.J. Bd. Pub. Utils. Nov. 16, 1998) ("BA-NJ Statement"); Bell Atlantic-Pennsylvania's Entry into In-Region InterLATA Services under Section 271, Docket No. M-00960840, Bell Atlantic-Pennsylvania Comments at 9-10 (Pa. Pub. Util. Comm'n June 11, 1998) ("BA-PA Comments"). Again, the price would increase over the course of two years, until it mirrored the price of similar resold lines. BA-NJ Statement at 3; BA-PA Comments at 9.[5]

Pre-Bell Atlantic/NYNEX merger, New York Telephone's restrictive policies would not likely have spread as fast or as efficiently to a different state of another BOC.

- In August 1997, "just days before the [Bell Atlantic]/NYNEX merger received final approval," then-NYNEX executed an interconnection agreement with Lightpath, which included "incident-based liquidated damages for poor performance, Extended Link at a fair blended provisional rate and a procompetitive interconnection architecture." Applications of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of Licenses and Section 214 Authorizations, CC Dkt. 98-184, Cablevision Lightpath Comments, Attach. at 2 (FCC Nov. 23, 1998). "The ink was barely dry on the merger before it became clear that the 'new' Bell Atlantic would adopt a considerably different and more litigious approach towards interconnection

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[5] Bell Atlantic's position has changed yet again. Bell Atlantic now refuses to provide UNE-P at all, and instead argues that it cannot be required to do so pending the FCC's determination on remand of the "necessary" and "impair" standard. This is in spite of the Supreme Court's reinstatement of Rule 51.315(b) and in direct contradiction to its commitment to the FCC to continue to provide access to the current list of UNEs pending the FCC's order on remand.

HDSL as an example of a supported service); Interconnection Agreement between SWBT and Cox Oklahoma Telcom, Inc., § 11.0 & App. UNE, § V (Apr. 10, 1997) (identifying 2- and 4-wire digital and analog loops as UNEs); Interconnection Agreement between SWBT and ICG Telecom Group, Inc., § 9.1 (Nov. 6, 1996) (same). However, SBC has since denied competitor's requests for digital loops, including TCG's initial request for HDSL in April 1998 after SBC had expanded its footprint by acquiring Pacific Telesis. Joint Application for Approval of the Reorganization of Illinois Bell Telephone Co. d/b/a Ameritech Illinois, and the Reorganization of Ameritech Illinois Metro, Inc., Dkt. 98-0555, Direct Test. of Kathleen L. Whiteaker on Behalf of AT&T, AT&T Ex. 3.0, at 19 (ICC Oct. 28, 1998) ("Whiteaker Direct Test."). "Recently, I have been told by SBC that HDSL compatible loops may be ordered, but in each instance TCG must go through a BFR process to determine availability and intervals for provisioning." Id.[2]

Similarly, on August 28, 1998 in the state Section 271 proceeding, the Arkansas PSC found that SWBT had failed to unbundle IDLC loops, as required by the FCC's Local Competition Order, and thus had failed to comply with checklist item (iv). Application of SWBT Seeking Verification That it Has Fully Complied With and Satisfied the Requirements of Sec. 271(c) of the Telecommunications Act of 1996, Docket No. 98-048-U, Consultation Report to the FCC at 18 (Ark. Pub. Serv. Comm'n Aug. 28, 1998).

- Although it initially opposed a "pick-and-choose" interpretation of Section 252(i), in May 1996, SBC at least acknowledged that CLECs had the right to elect an entire interconnection agreement, including "all the same terms and conditions to which the previous competitor agreed." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Dkt. No. 96-98, SBC Comments at 24 (FCC May 16, 1996) ("SBC Comments"). As the company has expanded its territory, however, SBC has failed to abide by its own cramped interpretation of Section 252(i). It has refused to allow carriers to elect another agreement, as SBC acknowledged the statute required.

  For example, Level 3 reports that SBC tried to force Level 3 to agree with SBC's position on compensation for ISP traffic before allowing Level 3 to elect. Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Licenses and Section 214 Authorizations, CC Dkt. 98-141, Level 3 Comments at 14 (FCC Oct. 15, 1998). Similarly, since SBC's takeover, PacBell has adopted several of SBC's anticompetitive policies. Id. at 19. For example, PacBell refused to allow Level 3 to opt into PacBell's agreement with MFS, arguing that the reciprocal compensation rate was too high. Id. at 19-20. At the same time, PacBell continued to operate with MFS under the agreement. Id. at 20.

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[2] SBC has apparently made "overtures" in the 271 context that it will provide ADSL by late first quarter 1999. Whiteaker Direct Test. at 19.

- Sprint's existing interconnection agreement with PacBell provides for an unbundled, conditioned xDSL loop:

  § 3.2.3 2-Wire Digital (ISDN/xDSL Capable) Link: This PACIFIC unbundled Network Element (2-wire) is an ISDN capable Link, which is an upgrade to the Basic Link for the transmission of digital services having no greater loss than 38db end-to-end, measured at 40,000 HZ with 135 ohms at the central office POI and 135 ohms at the MPOE; without loop repeaters, midspan repeaters may be required. This Link will not have any load coils or bridge taps within limits defined by the specification applicable to the ISDN/xDSL Links. In addition, the ISDN capable Link, without midspan repeaters, will be used for Link requests to support xDSL type transmission rates.

  The pricing provisions of the agreement do not include any incremental charges for conditioning the line. Sprint's contract with PacBell expires February 7, 2000. SBC has made it clear to Sprint personnel in charge of negotiating the new contract that PacBell will not agree to provide xDSL without charging a conditioning fee. In comparison to Sprint's current contract with PacBell, SWBT's new proposed ADSL contract language provides for loop conditioning charges more than twice the amount SWBT charges end users ($950.00).[3] This charge is also documented in recently filed interconnection agreements between SWBT and other carriers.[4]

  Other differences also arise between PacBell's and SBC's provision of information regarding xDSL availability. For example, PacBell does not assess a charge for DSL loop qualification. Eighty-seven of PacBell's serving wire centers are pre-qualified for ADSL deployment. For the remaining central offices, PacBell will check for DSL availability -- again, free of charge -- even though PacBell is not deploying DSL from that central office. SBC proposes to charge CLECs to determine DSL availability.

- Bell Atlantic has proposed restrictions on provision of the UNE-platform ("UNE-P") in its Section 271 prefiling statements in New Jersey, New York, and Pennsylvania. These restrictions were first filed in newly-acquired New York, and then spread rapidly to Bell Atlantic's existing states of Pennsylvania and New Jersey.

  In New York, for example, Bell Atlantic offered to provide UNE-P with the following restrictions: (1) for residence and business POTS and ISDN only; (2) availability limited to a 4 year (Zone 1) or 6 year (Zone 2) period; and (3) as to

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[3] PacBell recently advertised two new ADSL services to existing DSL customers. One package offered a low-speed (128 Kbps upstream) option for $59 month-to-month, or $39 for 1- to 3-year terms; the other offered a high-speed (384 Kbps upstream) option for $149 month-to-month, or $129 for 1- to 3-year terms.

[4] Sprint does not dispute that conditioned loops should be priced at TELRIC rates.